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In *THE*
SUPREME COURT OF *THE* UNITED STATES
OCTOBER TERM, 1976

United States ex rel.
JAMES R. MOORE,

Petitioner,

v.

THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner James R. Moore respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the denial of his Petition for a writ of Habeas Corpus.

OPINIONS BELOW

Petitioner was denied a writ of Habeas Corpus by the United States District Court for the Northern District of Illinois on June 5, 1975; on April 27, 1976, the Court of Appeals for the Seventh Circuit affirmed the judgment in an "Unpublished Order" (Appendix C, attached hereto).

The Illinois Supreme Court had affirmed Petitioner's conviction on April 6, 1972, in People v. Moore, 51 Ill. 2d 79, 281 N.E. 2d 294 (1972).

JURISDICTION

On April 27, 1976, the United States Court of Appeals for the Seventh Circuit entered an "Unpublished Order" affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, denying without a hearing, a Petition for a Writ of Habeas Corpus.

On June 10, 1976, the Petition for Rehearing En Banc was denied by the United States Court of Appeals for the Seventh Circuit.

The statutory provision believed to confer jurisdiction on this is 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Was the petitioner denied due process when, at Petitioner's pretrial hearing the prosecuting witness was allowed to view Petitioner for the first time since the alleged rape, even though Petitioner was not represented by counsel?

2. In addition to denying Petitioner Equal Protection of the laws, did the trial court's refusal to provide appointed counsel with transcripts of the confrontation proceeding and the preliminary hearing, also deprive Petitioner of the effective assistance of counsel?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment, United States Constitution

Fourteenth Amendment, United States Constitution

28 U. S. C. 2254

Nature of the Case

In a four-count complaint, Petitioner James R. Moore was charged with rape, robbery, burglary, and deviate sexual assault in December of 1967. The complaint was signed on December 12, 1967, by one Marilyn Miller, the only witness to the occurrence. Immediately thereafter, Petitioner appeared in court and was identified by Ms. Miller as the assailant. After a preliminary hearing in which Ms. Miller was the principal witness for the State, Petitioner was indicted, and counsel was appointed for him. After a trial by jury, Petitioner was found guilty on all charges, and the trial court imposed three concurrent sentences of 30 to 50 years and one of 5 to 10 years. The Illinois Supreme Court affirmed the conviction, and the United States District Court for the Northern District of Illinois denied a petition for a writ of Habeas Corpus without a hearing. The United States Court of Appeals for the Seventh Circuit, in an "Unpublished Order," affirmed the District Court's decision, and denied a petition for Rehearing en banc.

IDENTIFICATION PROCEDURE

At Petitioner's first court appearance, he was not represented

by counsel, and the following occurred:

The Clerk: James Raymond Moore.

The Court: Are you James Raymond Moore?

Mr. Moore: Yes, sir.

The Court: You're charged with rape and deviate sexual assault. Are you ready for hearing? Is Marilyn Miller here?

Miss Miller: Here.

Mr. Walsh (Assistant State's Attorney): This is an allegation of rape and deviate sexual assault. It's a home invasion of an apartment in Hyde Park . . . Do you see the man in Court today that committed these acts upon your person?

Miss Miller: Yes.

Mr. Walsh: Will you point to him?

Miss Miller: There. (Indicating James R. Moore)
(Appendix B, p. 2)

The above in-court showup was the complaining witness's opportunity to view any person suspected of having assaulted her. She had no further opportunities to view suspects before Petitioner's preliminary hearing. At that hearing, she again identified Petitioner. But it was not until after Petitioner's third time in court that he, an indigent, was appointed counsel.

The rape for which Petitioner was arrested took place at about noon on December 14, 1967, in a darkened bedroom. An unknown assailant entered the room, awakening the sleeping complainant, who testified that she saw the assailant's face for only ten or fifteen seconds. (Tr. 265)* This 10 to 15 second viewing formed the basis for the general description of a masked assailant which Ms. Miller gave the police shortly after the occurrence. One of the first officers to whom she spoke testified that Ms. Miller never mentioned having seen the assailant at any time prior to this ten-to-fifteen-second viewing. (Tr. 331)

However, some two days later, Ms. Miller gave a new, more detailed description to the police, alleging that the assailant was over 6 feet tall, weighing more than 200 pounds, and wore a beard. (Tr. 150) This augmented description stemmed from Ms. Miller's revelation that she had seen a man fitting that description at a restaurant-bar the

*The designation Tr. now hereinafter refers to the Transcript of the State proceedings had in Exhibit Number 68-549 in the Circuit Court of Cook County, Criminal Division.

night before the occurrence. So, although she did not inform the police of this immediately, her testimony at the identification suppression hearing indicated that she had met the Petitioner on a previous occasion (Tr. 115), but had not given him her name or address (Tr. 274).

Based on the revised description, police officers showed Ms. Miller three photographs, only one of which depicted a bearded man, the Petitioner. Notwithstanding Ms. Miller's refusal to pick out any one of the three photographs, police arrested James R. Moore on December 20, 1967.

The complaint which charged Petitioner with the alleged crimes was not signed at the time of his arrest. Instead, immediately before Petitioner was to appear in court, the police directed Marilyn Miller to sign a complaint which clearly named James Moore as the defendant. When she questioned this procedure, the detective told her that "it made no difference." (Tr. 287-288)

Additionally, Ms. Miller testified that she was sitting in the courtroom, expecting to make an identification when Mr. Moore's name was called. (Tr. 287)

The bailiff called Petitioner's name, and Ms. Miller recognized the name from the complaint she had just signed. (Tr. 287) Then, the judge stated Petitioner's name and quickly mentioned Marilyn Miller's name. Finally, the prosecutor even motioned to Ms. Miller to approach the bench. (Tr. 280) Ms. Miller testified that she was able to identify Petitioner not by seeing him walk into the courtroom, but because she recognized his name. (Tr. 98)

Besides the court personnel and the prosecutor, the only persons present at the bench were Petitioner, his wife, and the complaining witness. (Tr. 80-89) Thus, Petitioner was the only man present who could possibly have been identified as the assailant, and Ms. Miller did so identify him. Subsequently, a preliminary hearing was held, and the court found probable cause, based solely on Marilyn Miller's identification testimony.

The prosecution strengthened the impact of its suggestive identification procedure by making untrue statements at the showup. While asking the court for a continuance, the State's Attorney made the following, wholly unsubstantiated remarks: 4

Mr. Walsh: There's further investigation being conducted of prints being found on the scene . . . Taken from (the complainant) was a guitar and other instruments. When the defendant was arrested upon an arrest warrant signed by the Judge of the Court, the articles, the guitar and other instruments were found in the apartment, as were the clothes described of the man that attacked her that day. (Appendix B, p. 2; emphasis supplied.)

As the order of affirmance entered by the Court of Appeals points out, the emphasized portions of the prosecutor's comments were not true. Furthermore, defense counsel who represented Petitioner at trial -- but who was not appointed until April, 1968 -- had no knowledge that the remarks were made, nor that they were immediately followed by the prosecutor's elicitation of an identification by the witness.*

On February 5, 1968, Marilyn Miller testified as the only State's witness in Petitioner's preliminary hearing. At the hearing, she made a second identification of Petitioner which could only have been based on the prior in-court showup. Also her testimony about the occurrence embodied inconsistencies as to the lighting conditions at the time of the assault.**

At this hearing, Petitioner was not represented by his subsequently-appointed counsel. Nevertheless, when counsel made repeated requests for copies of the transcript of the proceedings, the trial court refused to provide him with them. (Tr. 9 - 11)

Appointed counsel made the first request before trial, reminding the Court that Petitioner was indigent and could not afford to pay for the transcript. Upon denial, he then filed a formal written motion before trial. (Respondent's Exhibit B, (Tr. 9 - 11) C-37, C-38)

*(R. 21, Appendix A, Record submitted to the Court of Appeals for the Seventh Circuit).

**Complainant testified at the preliminary hearing that the assault took place in mid-day in a room darkened by a quilt hanging over the window. However, she also testified that "it was night, as clear as it could be, but . . ." (From page 145 of the official Abstract of Record filed in this cause in the Supreme Court of Illinois, No. 42484.)

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Counsel renewed his request at trial, following the complainant's testimony. (Tr. 254-260) Again, the court refused to furnish the transcript, stating that under Illinois law, Petitioner was not entitled to it, nor was the State obligated to produce a copy of it. (Tr. 254-260)

In a final effort, appointed counsel raised this issue both orally and in writing, in post-trial motions. He further pointed out that while defense counsel had been prohibited from using the preliminary hearing transcript, the court and prosecutor had themselves seen a copy of it. Nonetheless, the trial court asserted both that any possible error flowing from the denial was harmless, and that counsel had not even requested the transcript. (Tr. 675-698)

When Petitioner appealed directly to the Illinois Supreme Court, the Court found that the denial of the transcript had indeed deprived him of Equal Protection of the laws. However, the Illinois Supreme Court concluded that the error was harmless. (People v. Moore, 51 Ill. 2d 79, 281 N. E. 2d 295 (1972)).

REASONS RELIED ON FOR ALLOWING THE WRIT

1. The photographic and corporeal identification procedures employed by the State were so highly suggestive as to violate the Sixth and Fourteenth Amendments.

The in-court showup to which Petitioner was subjected without benefit of counsel deprived him of due process and of his rights under the Sixth Amendment.

In this case, the complaining witness had had an extremely limited opportunity to view the actual assailant at the time she was raped. Her uncontroverted testimony itself established that she saw a man with a bandana covering the lower half of his face, in a darkened room, for a total of ten to fifteen seconds. Yet her memory was unaccountably refreshed several days hence when she went to view suspects' pictures. Only then did she see fit to inform police that she had seen a man whom she believed to be the assailant on an earlier occasion.

The complainant's delayed recollection of Petitioner gave the police a chance to search their files for a single picture of a heavy-set black man with a beard. The record discloses nothing to explain

Ms. Miller's thought process in deciding Petitioner was her assailant. But it does indicate that she was not positive of her identification until after police had prompted her with the complaint-signing procedure. (Tr. 98)

And even though only a week had passed between the alleged rape and the confrontation, the police and prosecutor had made it impossible for Marilyn Miller not to identify the man they had decided was the assailant. They were aware of her uncertainty, at the police station (Tr. 156), and later outside the courtroom when she questioned the method of signing a complaint before she had viewed the person named therein. (Tr. 287, 288) But their concerted efforts were designed to remove that uncertainty: she was shown Petitioner's name, and told to approach the bench when she heard it called, and was finally even motioned up to the bench.

When she heard the name that she recognized, the complainant had no other choice but to point out Petitioner. The suggestiveness was exacerbated by the following facts: Petitioner was the only person who entered the room from another door. He was the only black man in the room besides a uniformed bailiff. And he was therefore the only person who appeared to be the defendant in the case.

This confrontation procedure could not have been more suggestive or more prejudicial to Petitioner, yet it was conducted in a court of law, at a time when Petitioner was totally vulnerable because he had no counsel. The State's behavior in the instant case is exactly the sort which this Court has condemned in its decisions of Unites States v. Wade, 288 U. S. 218, 18 L. Ed. 2d 1149 (1967), Gilbert v. California, 288 U. S. 263, 18 L. Ed. 2d 1178 (1967), and Stovall v. Denno, 288 U.S. 293, 18 L. Ed. 2d 1199 (1967).

U. S. v. Wade, supra., held that counsel is required at pre-trial confrontations, and that a court must scrutinize any such procedure to determine whether counsel's presence was necessary to protect the right to a fair trial. Gilbert v. California, supra., decided the same day as Wade established that a tainted identification procedure could not be the basis for subsequent identifications unless it was supported by an independent source.

The procedure currently under discussion began with a suggestive photographic show-up. It continued with a patently improper courtroom confrontation. And it ended in a probable cause finding which rested on the treacherous ground created by these unfair proceedings. The independent source for the identification is the ten to fifteen second viewing of a masked assailant, in an unlit room.

Stovall v Denno, supra., and Neil v. Biggers, 409 U. S. 188, 34 L. Ed. 2d 401 (1972), delineated the rule which the courts should follow in determining whether, in the totality of circumstances, a defendant was denied due process by an unnecessarily suggestive show-up. Considering the factors outlined in Neil v. Biggers, supra., it is quite evident that the methods employed in the instant case created a substantial likelihood of misidentification.

First of all, the complainant had fifteen seconds to see only part of the assailant's face; this is not sufficient opportunity to create certainty in the witness' mind. Marilyn Miller admittedly lacked the requisite certainty throughout the identification procedures. Furthermore, it was never explained why she was so vague only moments after the assault, but had picked out a specific individual to describe as the assailant after days had passed.

It is unquestionable that during the attack, when the complainant was forced to lie on her stomach (Tr. 104), her attention was not focused on the assailant's face. Thus the second Neil factor is missing in this case.

As to the accuracy of the prior description of the assailant, Ms. Miller was able to supply only the broadest information. She told the first police officer that the suspect was a black man, 20 or 25 years old, about six feet tall, and wearing a yellow sweater. The police officer himself filled in a weight of 185 pounds. (Tr. 330) Petitioner was over 6'2" in height, weighing some 240 pounds, and wore a beard and moustache; but complainant did not mention these distinguishing features when she gave her on-scene description of the assailant.

The fact that Marilyn Miller was not certain that Petitioner was the man who had attacked her is undisputed. She admitted at the trial that her certainty at the time of the confrontation derived solely from the police officer's familiarizing her with Petitioner's name. (Tr. 287)

The complainant saw Petitioner walk into the room, and still she believed he was the assailant only because she knew his was the name on the complaint she had signed.

Given these potentials of suggestibility, Ms. Miller's testimony, which occurred long after the tainted identification proceeding, cannot be a sufficient independent source for any identification. The reliability of the fact-finding process was further decreased because defense counsel was not able fully to cross-examine this eye-witness as to the suggestive impact of the confrontation proceeding. Hence, even after subjecting the facts of Petitioner's situation to the close scrutiny required by Stovall and Neil, it remains clear that due process was denied here.

that the right to counsel does not attach until judicial criminal proceedings are initiated, so that the exclusionary rule would not apply to an identification based on a police station showup which took place before formal proceedings had begun. The rule in Kirby does not prevent Petitioner in the instant case from raising the suggestive showup issue. Formal court proceedings against him had not only begun at the time of the uncounseled confrontation, but the showup took place in the very midst of these proceedings.

Petitioner's case is an excellent example of misbehavior on the part of police and prosecutor, highlighted by the use of a courtroom as the setting for the improper conduct. Such a blatant misuse of the courts must at least constitute a denial of due process, therefore the later identifications which flowed from the procedure should have been excluded. Accordingly, this petition should be granted so that this Court may make the conclusive determination.

2. In addition to denying petitioner equal protection of the laws, did the trial court's refusal to provide appointed counsel with transcripts of the confrontation proceedings and the preliminary hearing, also deprive petitioner of the effective assistance of counsel?

Petitioner's trial counsel was appointed for him long after his first two court appearances. However, these pre-trial proceedings not only contained crucial testimony of the sole eyewitness, Marilyn Miller, but also critically suggestive in-court colloquy by the prosecution. Nonetheless, the trial Judge repeatedly refused to provide appointed

counsel with a copy of the trial transcripts for use in the trial. This erroneous denial prevented defense counsel not only from conducting effective preparation and potential cross-examination but also denied appointed counsel any real opportunity to elicit and explore the "totality of circumstances" of the concededly suggestive initial identification. The defense attorney's handicap in turn deprived Petitioner of the effective assistance of counsel.

Without the transcript of the initial compelled in-court identification, appointed counsel had no knowledge of the prosecutor's untrue statements about the recovery of her property, nor of the circumstances under which they were made.

Without such knowledge, petitioner's counsel was effectively deprived of the opportunity to pursue their suggestive impact either at the pre-trial hearing held to suppress the identification or at the trial in the state proceedings. The effect of such denial is attested to in the district court record, (R. 21, Appendix A), wherein trial counsel in an affidavit specifically stated that at the time of petitioner's trial, he (appointed counsel) had no knowledge of the prosecutor's untrue in-court remarks on December 21, 1967. He further had no doubt or reservation about stating that the lack of such knowledge not only seriously and substantially prejudiced his opportunity to demonstrate more suggestion and influence in Ms. Miller's identification but that without question with the transcript he would have been able to demonstrate more suggestion in such identification.

At Petitioner's preliminary hearing, a critical stage of the criminal proceedings, the complainant was the only State's witness to testify. Her testimony was essential for defense counsel's use for three reasons: First of all, it was founded on the suspect identification procedures employed by the prosecution. Secondly, the testimony contained statements which went directly to the question of her ability to observe the assailant. Thirdly, the testimony contained statements which contradicted her trial testimony.

Undeniably, these three elements in the preliminary hearing transcript bore directly on the credibility of the only occurrence witness in this case. Defense counsel could have used the transcript at trial to effectuate cross-examination of this witness. But since appointed counsel was prohibited from seeing a copy of the transcript, he did not even

know the extent of the damage contained therein. Far less could he provide effective assistance to his client.

Every time that the trial judge refused to give Petitioner's appointed lawyer access to the preliminary hearing transcript, he was usurping counsel's responsibility to make decisions as to the transcript's value. The trial court prevented defense counsel from using his own judgment regarding preparation and cross-examination, even though it was counsel's duty to his client to make these determinations. This behavior not only denied Petitioner equal protection, as the Illinois Supreme Court held, but also deprived him of effective representation.

It is not enough for the courts simply to appoint attorneys for defendants who cannot afford to hire their own. The right to counsel in this country is clearly the right to effective assistance of counsel. Gideon v. Wainwright, 372 U. S. 355, 83 S. Ct. 792 (1963); Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 (1932); see Argersinger v. Hamlin, 407 U. S. 25, 92 S. Ct. 2006 (1972). The trial court in the case at bar ignored this precept, and deprived Petitioner of his rights under both the Fourteenth and Sixth Amendments of the United States Constitution.

WHEREFORE, Petitioner now requests the Supreme Court of the United States to allow a writ of certiorari to issue to the United States Court of Appeals for the Seventh Circuit to review its judgment affirming the denial of Petitioner's writ of habeas corpus.

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U. S. C. 2254(a)

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.